

MODEL MOTION TO COMPEL FORECLOSURE

Abandoned foreclosures can be a significant cause of blight in our communities. Banks and servicers (collectively, the “lender”) will sometimes initiate foreclosure proceedings on delinquent loans only to determine that the costs of the process will be greater than the expected recovery from the foreclosure proceedings. The lender will then end its foreclosure efforts, effectively avoiding assumption of title to the property and the responsibilities of ownership. Often however, the borrower will assume he or she has lost the property and vacate the premises.¹ While the borrower and the lender walk away from the property, the community is left with an abandoned property to maintain. Though community members often have few options, Reinvestment Partners has successfully enforced the obligation of a lender to foreclose and sell properly situated abandoned property² to ensure that the property will have an owner interested in its upkeep. The following forms may allow other community advocates to replicate Reinvestment Partners’ process where a property is properly situated. Please note that these forms have been prepared for general information purposes only.

Nothing contained herein constitutes legal advice, and it should not be relied on as such. While the contours of the process may be similar in many situations, each abandoned foreclosure will involve particular facts and, therefore, require particular processes about which you should seek the advice of a qualified attorney.

THE PROPERLY SITUATED PROPERTY

In order to compel foreclosure under a deed of trust, several criteria must be met. Namely, the lender must have invoked the power of sale provision of the mortgage deed of trust by notifying the borrower, holding a hearing with the clerk of court, and getting the clerk to issue an Order of Sale. Before you make any filing with the clerk of court, determine the status of the abandoned property in your neighborhood by checking the following public records:

1. Identify the property owner by searching your county’s property records. As an example, Durham County’s relevant tax records are available here:
<http://www.ustaxdata.com/nc/durham/durhamsearch.cfm>.
2. Locate the Deed of Trust to determine it contains mandatory language requiring foreclosure (see the Fannie/Freddie Language under the heading DEED OF TRUST REQUIRES FORECLOSURE). The Deed of Trust should be available through your county’s Register of Deeds. Often these records are available online and the Deed of Trust can be found by conducting a Grantor search using the Owner’s name. You should also be able to find notices of foreclosure and foreclosure sale notices in this database. As an example, Durham’s Register of Deeds search is available here: <http://rodweb.co.durham.nc.us/>].

¹ For an in-depth look at “bank walkaways” see the GAO report, *Mortgage Foreclosures: Additional Mortgage Servicer Actions Could Help Reduce the Frequency and Impact of Abandoned Foreclosures*. It is available at <http://www.gao.gov/new.items/d1193.pdf>.

² <http://www.marketplace.org/topics/wealth-poverty/sometimes-even-banks-want-walk-away-home>

3. The lender may not be able to foreclose because of a stay instituted in the borrower's bankruptcy proceeding. Bankruptcy records are public and available for a small fee through the PACER records system. You can register for a PACER account and search these records here: http://www.pacer.gov/reg_pacer.html.

THE BASIC PROCESS

If, after reviewing this information, you believe the lender has invoked the power of sale in the deed of trust and the property is not subject to a bankruptcy stay, the following documents can serve as a resource as you work through the process. A few instructions on how to use the documents:

1. There are four separate documents below: (1) a sample motion to compel foreclosure, (2) a sample hearing notice, (3) a sample order, and (4) a sample certificate of service. These samples should provide forms for most of the documents that the clerk of court will request.
2. The documents are in fill-in-the-blank format. The blanks are meant to point you in the right direction and guide you to the kinds of information the clerk will find relevant. Not every blank is required or necessarily applicable to your situation, nor would filling the blanks provide an exhaustive list of relevant information, particularly regarding your standing to bring the case. Please fill in, or in some instances delete, these blanks as you may find necessary.
3. Text that is underlined and in brackets is variable from case to case, while non-underlined text relates to information likely necessary to a successful petition.
4. Some of the blanks ask for an attorney's name or bar number. Though we recommend you consult an attorney to guide you through the process, hiring or consulting an attorney may not be required for the submission of such form if you feel capable of understanding and filing the action yourself.

NORTH CAROLINA) IN THE GENERAL COURT OF JUSTICE
) SUPERIOR COURT DIVISION
[] COUNTY) BEFORE THE CLERK
) [] SP []³

Foreclosure of Real Property Under Deed of Trust) MOTION TO FORCE
From [Owner's name], in the original amount of) FORECLOSURE
\$[], dated [], 20__) AND BRIEF IN
in Book [], Page [], [] County Registry) SUPPORT

TO: The Honorable Clerk of Court of [] County

NOW COMES the Movant, [Name of Movant], under the above captioned Deed of Trust (the "Deed of Trust") and respectfully shows the court:

HISTORY OF THE CASE

1. The property that is the subject of this matter is commonly known as [Address of Property] (the "Property"). [Name of the Property's owner], (the "Owner") owned the property subject to the Deed of Trust and resided therein until approximately [Month & Year].
2. The Lender sent the Property Owner a Notice of Foreclosure on [Month] [Day, Year].
3. The Lender sent the Property Owner a Notice of Hearing on [Month] [Day, Year].
4. On [Month] [Day, Year] [Name of (Assistant) Clerk of Superior Court], (Assistant) Clerk of Superior Court heard this cause and issued an Order of Sale finding that the Substitute Trustee could sell the property under the terms of the Deed of Trust and conduct a foreclosure sale in accordance with applicable law.
5. [The Notice of Sale was published on [Month] [Day, Year] setting a sale date for [Month] [Day, Year]].
6. [The sale was postponed until [Month] [Day, Year]].
7. The Property has been vacant and abandoned since approximately [Month & Year].
8. [If the Owner has received a Discharge of Debt through a Chapter 7 bankruptcy, list the date of the discharge⁴ here].
9. [Describe the history of Substitute Trustee's involvement with the matter. The Substitute Trustee is the party who filed the foreclosure action under the Deed of Trust].

³ Please insert the Special Proceeding number brought by the Substitute Trustee. The Clerk of Court may be able to provide this case number.

⁴ Sample language: [On [Month] [Day, Year], [Owner's full name], named in the above captioned matter, received a Discharge of Debts in his Chapter 7 bankruptcy case. The case number is [##-#####].

10. [The most recent Notice of Foreclosure Sale set a sale date for this matter on [Month] [Day, Year].]
11. [A Notice of Postponement was filed on [Month] [Day, Year], postponing the sale until [Month] [Day, Year] at [_____AM/PM].]
12. No sale was held on [Month] [Day, Year], or at any time following that date. [Note that: “Pursuant to N.C.G.S.A. § 45-21.21(d), the sale cannot be postponed to more than 90 days past the original sale date.”]

STANDING OF [NAME OF MOVANT] TO BRING MOTION⁵

1. [Name of Movant] is [include a brief description of the Movant. For instance, if the Movant is a 501(c)(3) nonprofit agency, describe the agency's purpose and mission statement].
2. [Movant] is located at [Movant's address]. [Movant] is located [describe the distance from the Property, e.g. "exactly one block west from the Property"].
3. [If the Movant is active within the particular neighborhood as the Property, describe this involvement here].
4. [If the Movant has invested in the revitalization on the neighborhood or community, please describe that involvement here, using the following format: To date, [Movant] has invested significantly in the revitalization of the [neighborhood / community] by redeveloping or currently redeveloping [list any properties being developed].
5. [List any grants or endowments that Movant has received to revitalize the community].
6. [Movant] also has a vested interest in the safety of its [employees / members / family] in the [neighborhood / community].
7. [List any other ways the Property's condition has harmed you, such as through decreased property values, increased crime, or even just by being an eyesore].
8. Based on the totality of the factors listed above, [Movant] prays this Court to find that [Movant] has standing to bring the instant Motion.

⁵ A municipal attorney wishing to compel foreclosure using this form will need to consider the factors that give the city standing or consider alternative solutions such as a tax foreclosure action or code enforcement proceeding.

[Address of Property] IS ABANDONED, IN OWNERSHIP LIMBO, AND THREATENS
NEIGHBORHOOD SAFETY AND ECONOMIC VALUE

1. The Property has remained in an abandoned and boarded state for [length of time].
2. The Owner has not maintained the Property since the filing of the Notice of Foreclosure in [Year].
3. [Name of institution] is the Substitute Trustee but has taken no action to proceed with the foreclosure since [Month] [Day, Year] of last action in the foreclosure proceeding].
4. The Property is causing community blight as a direct result of the Lender failing to complete the foreclosure sale.
5. Loan servicing was transferred from [bank] to [servicer] (collectively the “Lender”) during the time period in which the Property has remained abandoned. [This information is highly specific to each individual case. There are no general or universalizable methods of locating this information, but calling the bank listed as the Grantor under the Deed of Trust may be a good place to start].
6. [Check for any bankruptcy documents from Owner to see if the Property was included in his or her bankruptcy. If so: Owner included the Property in his or her bankruptcy and has not maintained the Property. It is not economically sound to spend money to maintain a property that is not scheduled for a foreclosure sale, especially when personal liability for the property has been discharged through bankruptcy].
7. The Lender has not maintained the property beyond the minimal property preservation required of boarding the windows and possibly winterizing the plumbing system has been completed. It is not economically sound for the Lender to spend money to maintain a property that is not part of its REO portfolio.
8. However, despite the economic predicaments of both the Property Owner and the Lender, the neighborhood and community have suffered because of the abandonment and lack of maintenance of the property.
9. [Describe deterioration⁶ of the Property’s physical condition].
10. [Describe any criminal activity or vagrancy at the property. You may be able to find some of the criminal activity from a particular property through your city or county’s crime blotter (as an example, Durham’s is available in Crime Information at <http://www.durhampolice.com>). Your local police department may be willing to provide more detailed information over the phone].

⁶ Sample language describing the deterioration: [The front and back porches are deteriorated and pose a safety risk and nuisance to the neighborhood. Bedding and personal belongings are on the back porch of the Property, indicating the presence of vagrants. The yard is not maintained and is littered with trash including hypodermic needles and other hazardous waste.].

11. [Describe any litter or waste that is on or around the property].
12. [List any code violations on the Property. You can likely get this information by calling your county's inspection department. As an example, Durham County's inspection department's contact information can be found here: <http://durhamnc.gov/ich/cb/ccid/Pages/Home.aspx>].
13. Thus, the condition of the house is threatening the safety of the neighborhood.

DEED OF TRUST REQUIRES FORECLOSURE

1. [page and paragraph number] of the Deed of Trust provides for the disposition of the Property upon the Owner's default and acceleration of the mortgage.
2. In pertinent part, the Deed of Trust states that:
 - a. [Should be in all Fannie/Freddie documents:]

If Lender invokes the power of sale, and if it is determined in a hearing held in accordance with Applicable Law that Trustee can proceed to sale, Trustee shall take such action regarding notice of sale and shall give such notices to Borrower and to other persons as Applicable Law may require. After the time required by Applicable Law and after publication of the notice of sale, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Lender or its designee may purchase the Property at any sale.

3. In the instant case, Lender originally invoked the power of sale in [Month & Year] upon the filing of the Notice of Hearing.
4. The hearing was held on [Month] [Day, Year] before [official presiding for the Clerk of Court] and the Order of Sale was issued.
5. [Note any stays from bankruptcy filings or otherwise].
6. [If the Owner filed for bankruptcy: Had the lender intended to forego foreclosing on the property, the Trustee was not required to take any action following the entry of the Automatic Stay].
7. [Again, if the owner filed for bankruptcy: However, the Trustee filed a motion for Rendering File Active on [Month] [Day, Year] and noticed the sale for [Month] [Day, Year]].
8. [The Notice of Sale set a sale date of [Month] [Day, Year]].

9. [Note any Notice of Postponements of the sale. If there have been postponements: “Despite the 90 day time limit established by N.C.G.S.A § 45-21.21(d), no sale has been held.”].
10. Because the Trustee took all necessary steps required by law and the terms of the Deed of Trust to invoke the sale and prosecute the matter at a hearing, the mandatory language of the Deed of Trust requires that the foreclosure process be completed.
11. The Deed of Trust mandates that the sale be held which will result in the Property being returned to the Lender for handling through its REO Department or place it in the hands of a new purchaser.
12. Thus, requiring foreclosure of the Property will remove it from a state of uncertainty regarding ownership and allow for the minimization of blight to the community.

WHEREFORE, the undersigned moves the Court to grant an order requiring Trustee to complete the foreclosure process on the subject property.

This the [nd/th/st/rd] day of [Month, Year].

[Signature of Attorney or Movant]

[Name of Attorney or Movant]

[Bar No. of Attorney]

[Address of Attorney or Movant]

[Phone number of Attorney or Movant]

CERTIFICATE OF SERVICE

I, [Name of Filing Attorney for Movant], hereby certify that on [Month] [Day, Year], I served copies of the foregoing Motion to Force Foreclosure and Brief in Support on the following parties by mailing them first class, postage prepaid to the following addresses:

<u>[List all known addresses of Owner:]</u>	[<u>Name of First Substitute Trustee</u>] Substitute Trustee [<u>Name of Substitute Trustee's Organization</u>] [<u>Address Line</u>] [<u>Address Line</u>]
	[<u>Name of Second Substitute Trustee</u>] Substitute Trustee [<u>Name of Substitute Trustee's Organization</u>] [<u>Address Line</u>] [<u>Address Line</u>]

NORTH CAROLINA)
)
 [_____] COUNTY)
)

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE CLERK
[] SP []

Foreclosure of Real Property Under Deed of Trust)
From [Owner's Name], in the original amount of)
\$[____.____], dated [_____, 20__] and recorded)
in Book[____], Page [____], [____] County Registry)

NOTICE OF HEARING
ON MOTION TO FORCE
FORECLOSURE

TO THE ATTORNEYS AND PARTIES OF RECORD

The Clerk of Court, Special Proceedings Division, has scheduled a hearing in the above-captioned case to hear the Motion to Force Foreclosure. The hearing is scheduled for [Month] [Day, Year] at [_____] AM/PM].

This is the [__nd/th/st/rd] day of [Month, Year]

[Signature of Attorney or Movant]

[Name of Attorney or Movant]

[Bar No. of Attorney]

[Address of Attorney or Movant]

[Phone number of Attorney or Movant]

CERTIFICATE OF SERVICE

I, [Name of Attorney or Movant], hereby certify that on [Month] [Day, Year], I served copies of the foregoing Notice of Hearing on the following parties by mailing them first class, postage pre-paid addressed to the following addresses:

<u>[List all known addresses of Owner:]</u>	<u>[Name of First Substitute Trustee]</u> Substitute Trustee <u>[Name of Substitute Trustee's Organization]</u> <u>[Address Line]</u> <u>[Address Line]</u> <u>[Name of Second Substitute Trustee]</u> Substitute Trustee <u>[Name of Substitute Trustee's Organization]</u> <u>[Address Line]</u> <u>[Address Line]</u>
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Date

[Name of Attorney or Movant]

NORTH CAROLINA) IN THE GENERAL COURT OF JUSTICE
)
[] COUNTY) SUPERIOR COURT DIVISION
) BEFORE THE CLERK
) [] SP []

Foreclosure of Real Property Under Deed of Trust)
From [Owner's name], in the original amount of) ORDER
\$[], dated [], 20__)
in Book[], Page [], [] County Registry)

The Honorable (Assistant) Clerk of Superior Court of [County], [heard argument on the Motion filed by Movant] seeking an Order forcing foreclosure on [Full Address of Property]. The Motion was taken under submission by the Court, and it is hereby allowed. [Name of Movant] has standing to bring the motion. The [Address of Property] has been abandoned by the title owner, [Name of Owner]. Trustee invoked the power of sale and an Order of Sale was issued following a hearing. Trustee properly noticed the sale. The language of the Deed of Trust is controlling and mandates the property be sold.

IT IS HEREBY ORDERED:

1. That Trustee notice the property of sale in accordance with Applicable Law for a date not later than 90 days from the date of this order;
2. That Trustee conduct the sale on the next scheduled date;
3. That Trustee shall take all action required by Applicable Law to finalize and close the foreclosure file.

Ordered this the [nd/th/st/rd] day of [Month, Year].

[Name of (Assistant) Clerk of Superior Court]
Clerk of Superior Court [County], NC

NORTH CAROLINA)
)
 [_____] COUNTY)
)

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE CLERK
[] SP []

Foreclosure of Real Property Under Deed of Trust)
From [Owner's name], in the original amount of)
\$[_____.____], dated [_____, 20__] and recorded)
in Book [____], Page [____], [____] County Registry)

CERTIFICATE OF SERVICE

I, [Name of Attorney or Movant], hereby certify that on [Month] [Day, Year], I served copies of the foregoing Order forcing foreclosure of [Address of Property] on the following parties by mailing them first class, postage pre-paid to the following addresses:

<p>[List all known addresses of Owner:]</p>	<p>[Name of First Substitute Trustee] Substitute Trustee [Name of Substitute Trustee's Organization] [Address Line] [Address Line]</p> <p>[Name of Second Substitute Trustee] Substitute Trustee [Name of Substitute Trustee's Organization] [Address Line] [Address Line]</p>
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Date

[Name of Attorney or Movant]